

Service Date: September 13, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF RICKEY ROST AND)	TRANSPORTATION DIVISION
HARRY ELLIS, a Partnership, dba DISPOSAL)	
SERVICE COMPANY, Application for)	DOCKET NO. T-02.83.PCN (TA)
Certificate of Public Convenience and)	
Necessity, Class D, Solid Waste, Custer and)	ORDER NO. 6524
Prairie Counties, Montana)	

ORDER GRANTING APPLICATION FOR TEMPORARY OPERATING AUTHORITY

Introduction

1. On August 15, 2002, Rickey Rost and Harry Ellis, partners dba Disposal Services Company (Disposal Services), applied before the Public Service Commission (PSC) for temporary Class D (solid waste) motor carrier authority. The requested service is for Custer County and Prairie County, Montana. The application appears substantially proper in form and is supported by about 40 letters or affidavits (an accompanying application for permanent authority is supported by about 150 letters or affidavits). The application is protested by Waste Connections of Montana, Inc. (Waste Connections) and the Town of Terry (Terry). Both protestants are incumbent Class D carriers providing services in Disposal Services' requested service areas.

2. This order pertains only to the application for temporary authority. It has no direct bearing on the outcome of Disposal Services' application for permanent authority, which will be processed according to PSC procedures and will be granted or denied at a future time. Arguments on the application for temporary authority have been submitted by all parties. No hearing is required. No hearing has been held.

Findings of Fact

3. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this order are incorporated herein as findings of fact.

4. Disposal Services (unknown whether Harry Ellis was directly affiliated at that time) has leased a Class D motor carrier authority and has provided services in the Custer County, Montana, area (primarily Miles City) for about the past two years. On July 8, 2002, the PSC issued a final order revoking the Class D authority,

PSC No. 9131, leased to Disposal Services and owned by James Jones, dba Oilfield Maintenance. *See, PSC Docket No. T-00.50.COM, Order No. 6516 (July 8, 2002).* Revocation was deferred by the PSC for 60 days (to about September 9, 2002) from the service date of the revocation order, primarily to allow time for customers served under the leased authority to make other arrangements for solid waste transportation.

5. In support of a grant of temporary authority Disposal Services asserts existing service to over 400 customers will be cancelled without the grant. Disposal Services also asserts some of its customers have been billed in advance for 12 months and refunds following any termination of service will present a problem. The PSC determines these assertions are most likely accurate.

6. Disposal Services asserts the existing leased authority was not cancelled because of any wrongdoing by it. The PSC determines this is true. Nothing of record in the revocation proceedings (*PSC Docket No. T-00.50.COM*) or this application for temporary authority demonstrates Disposal Services knew or should have known the authority leased by it was invalid, although Disposal Services was aware of the pending complaint against the authority and had been an active participant in that complaint proceeding. The PSC also determines Disposal Services has, in good faith and reasonable reliance on the integrity of the leased authority, made investment of both resources and time and has been in operation for a significant period. Disposal Services also asserts the grant of temporary authority will not create a new authority or a new service, but will merely replace existing (but soon to be revoked) authority and its related services. The PSC determines this is also true.

7. Disposal Services asserts its service has been competitive, responsive, dependable, and courteous and has resulted in low or lower rates, all of which customers have not previously experienced in the area. The PSC determines Disposal Services' operations have created competition in the Miles City area and may have resulted in lower rates and a wider range of service options. The PSC has no reason to believe Disposal Services has not been responsive, dependable, and courteous to its customers. The PSC cannot determine at this time whether customers have not experienced these things (e.g., responsive, courteous service, etc.) through the existing carriers in the area.

8. Disposal Services asserts that over 100 supporting letters or affidavits have been obtained in support of permanent authority and many witnesses in support will be available to testify at the hearing on the permanent authority. Disposal Services asserts competition is in the public interest and has been expressly made an element of Class D authorities (§ 69-12-323(2)(b), *MCA, allowing consideration of competition in the granting of Class D authorities*). Disposal Services asserts competition can be considered in applications for temporary authority because it is a part of the service available to customers, provides a benefit to customers, and, by definition, no single carrier can provide competitive service or fulfill the accompanying benefit.

Conclusions of Law

9. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

10. A termination of service to over 400 Disposal Services customers is somewhat compelling as to a grant of a temporary authority. It is true that Disposal Services and its customers have been provided a period to arrange for other transportation service through deferred revocation of the existing authority, but that does not nullify the apparent preference- and need-related customer support for continued service. Customers being billed in advance for 12 months and a potential that refunds following termination of service will present a problem is not, in and of itself, compelling in regard to a grant of temporary authority, but it is also a factor to be considered.

11. The "innocence" of Disposal Services regarding the apparent validity of the authority leased by it is an important factor. From all appearances Disposal Services has made substantial investment of both resources and time, has been successful in obtaining customers, and has been in operation for a significant period. Disposal Services is correct that a grant of temporary authority will not create a new service, but will merely replace existing services. This presents unique circumstances pertaining to grants of temporary authority. The applicant is an existing, operating carrier with a substantial customer base, not a new entrant.

12. Disposal Services argues competition is in the public interest and has been expressly made an element of Class D authorities (§ 69-12-323(2)(b), MCA, *which allows consideration of competition in the Class D environment*). Disposal Services argues competition can be considered in applications for temporary authority because it is a part of the service available to customers, provides a benefit to customers, and, by definition, no single carrier can provide that service or fulfill the accompanying benefit. Although the PSC might not agree entirely with Disposal Services' logic, the basic argument is sound.

13. Terry, which holds Class D authority in parts of Prairie County, argues no Disposal Services' supporting affidavits pertain to Prairie County, Disposal Services has not previously provided service in that area, and Terry is fully capable of providing all service necessary. Waste Connections, argues that it is fully capable of meeting all customer service requirements in the areas affected by Disposal Services' application for temporary authority. Waste Connections argues, in accordance with § 69-12-207, MCA, that the PSC cannot lawfully issue a temporary authority when a carrier capable of providing the service exists.

14. The law governing temporary motor carrier authority is provided at § 69-12-207, MCA, and PSC rules ARM 38.3.501 through 38.3.506. Section 69-12-207, MCA, allows temporary authorities (for up to 90

days, with an allowance for a 30 day extension) when an immediate and urgent need exists in an area having no existing carrier capable of meeting that need. The referenced PSC rules reiterate this statutory standard and include certain procedural requirements.

15. The PSC determines that the governing legal and factual points underlying the standard for issuance of a temporary authority exist in regard to Disposal Services' application for temporary authority. Temporary authority will "enable a service for which there is an immediate and urgent need ... [in an area] ... having no carrier capable of meeting such need" § 69-12-207, MCA. The service is an existing (not proposed) competitive service. The service fulfills what customers have indicated is a strong preference and need and the PSC views this as an immediate and urgent need, in context. The existing carriers, whether willing to do so (and probably are, if necessary) or not, cannot provide a competitive service without a competitor. This conclusion is directly linked to the temporary nature of the authority granted and the existing customer base of Disposal Services, and the customer supported, established competitive operations of Disposal Services. This conclusion will not necessarily extend to applications regarding new entrants.

ORDER

IT IS HEREBY ORDERED the application of Rickey Rost and Harry Ellis, partners dba Disposal Services Company, for temporary Class D (solid waste) motor carrier authority to serve in Custer County and Prairie County, Montana, is GRANTED, for 90 days (extension allowed on motion) from the date of the PSC vote (see below), as follows:

Class D -- Garbage between all points and places in Custer County and Prairie County, Montana. Carrier is permitted to transport authorized commodities to certified landfills from territory authorized.

Done and dated this 5th day of September, 2002, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Order Granting Application for Temporary Operating Authority in Docket T-02.83.PCN was today served on all parties of record to that docket.

MAILING DATE: September 13, 2002

FOR THE COMMISSION

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